UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

ADVOCATES FOR ARTS-BASED EDUCATION CORPORATION D/B/A LUSHER CHARTER SCHOOL

Employer

and **Case 15-RC-174745**

UNITED TEACHERS OF NEW ORLEANS, LOCAL 527, LFT, AFT

Petitioner

UNION'S OPPOSITION TO COMPANY'S REQUEST FOR REVIEW

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I. INTRODUCTION

After the United Teachers of New Orleans, Local 527, LFT, AFT (Petitioner or Union) filed its Petition under Section 9(c) of the National Labor Relations Act (NLRA or Act), as amended, a National Labor Relations Board (Board) Hearing Officer held a hearing on May 13, 2016 in New Orleans, Louisiana. The only issue was whether the Board has jurisdiction over Advocates For Arts-Based Education Corporation d/b/a Lusher Charter School (Employer or Lusher), the operator of a charter public school.

The Employer asserted that the Board does not have jurisdiction over it because Section 2(2) of the Act exempts from the Board's jurisdiction any "State or political subdivision thereof" and that it was a political subdivision of the State of Louisiana. But the Regional Director concluded that the Employer was not a political subdivision of the State but, rather, a private non-profit corporation subject to the Board's jurisdiction.

The Employer now requests a review of the Regional Director's May 10, 2016 decision and direction of election, again arguing that the National Labor Relations Board (NLRB or Board) does not have jurisdiction. The Employer gives the following "compelling" reasons for its request: (1) there is an absence of reported Board precedent concerning whether charter schools are political subdivisions of the state, and (2) the Regional Director's ruling is prejudicial to the Employer. The Employer makes three arguments in support of its position that the Board lacks jurisdiction: (1) that the Employer is a political subdivision under the first prong of the *Hawkins* test; (2) that the Employer is a joint employer with Orleans Parish School Board (OPSB), and (3) that the Board should decline to assert jurisdiction because the State of Louisiana has called for the creation of charter schools as an integral part of its public education system. The Employer also faults the Regional Director for "improperly" relying solely on *Chicago Mathematics & Science Academy Charter School, Inc.,* 359 NLRB No. 41 (2012). However, in its own Statement of Position (SOP), it was the Employer who called attention to *Chicago Mathematics*. Indeed, in light of the Employer's SOP, the Regional Director would have been remiss not to address the decision.

In its SOP, the Employer argued that it was a political subdivision under both prongs of the *Hawkins* test but never argued either in its SOP or in the hearing that it was a joint Employer with OPSB, nor that the Regional Director should use its discretion to decline to assert jurisdiction, nor was evidence introduced to support either contentions. Employer makes these arguments for the first time in its Request for Review.

II. FACTS

In 2006, the Employer began operating the Lusher Charter School, under a contract with the Orleans Parish School Board (School Board or OPSB). Lusher Charter School

consists of grades kindergarten through twelve on two campuses in the City of New Orleans, State of Louisiana. Before the Employer's operation of Lusher Charter School, OPSB had operated a school named Lusher, at one of the same locations. While the employees at the school were previously employed and paid by the OPSB, they are now employed and paid by the Employer. Tr. 61. The Lusher teachers participate in the Teacher Retirement System of Louisiana. Tr. 37. The Lusher employees are evaluated by the Lusher administration, not by OPSB or the State. Tr. 60. On April 25, 2016, the Union filed the petition to represent certain employees of the Employer.

A. Louisiana's Charter Law

In 1997, the Louisiana Legislature passed the Louisiana Charter School Demonstration Programs Law, La. R.S. 17:3971, *et seq.* (Charter School Law) to allow local school authorities to enter into contracts with nonprofit corporations to operate public schools.[1] Section 3972 (A) of the Charter School Law states:

> It is the intention of the legislature in enacting this Chapter to authorize experimentation by city and parish school boards by authorizing the creation of innovative kinds of independent public schools for pupils. Further, it is the intention of the legislature to provide a framework for such experimentation by the creation of such schools, a means for all persons with valid ideas and motivation to participate in the experiment, and a mechanism by which experiment results can be analyzed, the positive results repeated or replicated, if appropriate, and the negative results identified and eliminated. Finally, it is the intention of the legislature that the best interests of at-risk pupils shall be the overriding consideration in implementing the provisions of this Chapter.

[1] *See* La. R.S. 17:3983(A)(1) ("Any of the following may form a nonprofit corporation for the purpose of proposing a charter as provided in this Subsection. "); La. R.S. 17:3983(A)(4)(a) ("A local school board and a local charter authorizer may enter into any charter it finds valid, complete, financially well-structured, and educationally sound."); La. R.S. 17:3972(B)(1) ("The purposes of this Chapter shall be to provide opportunities for educators and others interested in educating pupils to form, operate, or be employed within a charter school with each such school designed to accomplish one or more of the following objectives. ")

Section 3991(A)(1)(a) of the Charter School Law mandates[2] that, the operator of a charter school be "organized as a nonprofit corporation under applicable state and federal laws." Subsection (A)(2) states:

> Consistent with the provisions of this Chapter, a charter school and its officers and employees may exercise any power and perform any function necessary, requisite, or proper for the management of the charter school not denied by its charter, the provisions of this Chapter, or other laws applicable to the charter school.

Notably, however, the Charter School Law contains no provisions for appointing or removing board members.

The Charter School Law has been implemented by Bulletin 126, which was promulgated by the Louisiana Board of Elementary and Secondary Education pursuant to its authority under La. R.S. 17:6(A)(10) and R.S. 17:3981. It is codified at Louisiana Administrative Code, Title 28, Part CXXXIX, § 101, La. Admin. Code tit. 28, pt. CXXXIX, § 101.

As a Type 3 charter school, the Employer is subject only to "oversight" by OPSB, the 'local charter authorizer." La. Admin. Code tit. 28, pt. CXXXIX § 417. The Louisiana Department of Education "shall monitor and evaluate academic performance of charter schools authorized by local charter authorizers in accordance with BESE policy." § 417(A). "Each local charter authorizer shall monitor and evaluate, on an ongoing basis, the legal, contractual, financial, and academic performance of the schools it has authorized, and shall ensure the health and safety of all students in the schools it authorizes." § 417(B).

[2] There is one exception not applicable here.

B. The Employer's Articles of Incorporation

On August 23, 2005, Articles of Incorporation were filed with the Louisiana Secretary of State creating the Employer as a Louisiana nonprofit corporation (Petitioner Exhibit 1). Article VII (Directors), states that the "powers and management" of the corporation are vested in its board of directors and that all directors shall be "elected by plurality vote of the board." None of the original members of the Lusher board of directors was appointed by the State nor by the OPSB; they were all private individuals "from the community." Tr. 48-50. The Articles contain no explicit provision for the removal of a board member.

C. The Chartering Authority and Agreement

Employer Exhibit 2, the School Board Chartering Authority, sets out criteria to be included in all charter agreements between OPSB and charter operators. Section 3 subjects charter school boards to a number of "good government" statutes, including requiring the entity to be maintained as a nonprofit corporation, mandating that 60% of its members reside within the Parish of Orleans, limiting to no more than one member of an immediate family who may serve on the board, and prohibiting elected officials from serving on the board. However, the Chartering Authority contains no provisions for appointing or removing board members.

On January 11, 2006, the Employer entered into a charter contract with OPSB to "operat[e] a charter school known as Lusher Charter School." The most recent charter agreement between the Employer and the School Board was signed in 2011 (Employer Exhibit 2).

Section 1.1.5 requires the Employer to maintain itself as a nonprofit corporation. Section 1.2.3 states:

> The Charter Board shall be the final authority in matters affecting Charter School, including but not limited to staffing, job titles, employee salary and benefits, financial accountability and curriculum.

Section 1.2.4 provides that the Employer is subject to the State's Open Meetings Law, the Public Records Law, the Code of Governmental Ethics, and the Public Bid Laws for the construction or alteration of immovable property. Section 1.2.5 requires the board members to submit financial disclosures as required by the Code of Government Ethics. Section 1.2.6 requires the Employer to "at all times maintain itself as a Louisiana non-profit corporation." Violation of any section of the charter could lead to revocation of the charter or other sanctions. However, the charter agreement contains no provisions for appointing or removing board members.

La. Admin. Code tit. 28, pt. CXXXIX, § 2103 clearly provides that the "board of directors of each charter operator shall be responsible for implementing the public school charter program proposed in its charter application, complying with and carrying out the provisions of the charter school contract and complying with all applicable federal and state laws and policies governing the charter school." § 2103(A). A charter operator's board of directors 'shall comply with all requirements set forth by the Louisiana Nonprofit Corporations Law and Louisiana Secretary of State and shall remain in good standing during the term of its charter." § 2103(C).

The Charter School Law and Bulletin 126 clearly establish and require the Employer's status as a private contractor. Indeed, § 2103(F) mandates that the "board of directors of each charter operator shall exercise final authority in matters affecting the charter school including, but not limited to, staffing, financial accountability, and curriculum." (Emphasis added). Section 2901(C) of Bulletin 126 specifically provides that a "charter operator shall have exclusive authority over all employment decisions in the charter school . . . . "

III. ARGUMENT[3]

The United States Congress excluded government entities from the NLRB jurisdiction. Section 2(2) of the Act excludes from the definition of employer "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." An entity may be considered a "political subdivision" if it meets *either* of two standards: 1) it was created directly by the State so as to constitute a department or administrative arm of the government; or 2) it is administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County,* 402 US 600, 604-05 (1971). In *Hawkins County*, 402 U.S. at 604-06, the Supreme Court held that a natural gas utility district organized under Tennessee law was a political subdivision of the state and thus not an employer under the NLRA. It so held based on the following facts: the district had imminent domain powers, was statutorily declared to be a municipality, and its officers/commissioners were appointed by a county judge and subject to removal under Tennessee's general ouster law. The removal of the commissioners could be initiated by the governor, state attorney general, the county prosecutor or ten citizens.

The Board has held that Section 2(2) exempts "only government entities or wholly owned government corporations from its coverage —not private entities acting as contractors for the government." *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002) (*quoting Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999)). Here, the Employer satisfies neither prong under *Hawkins,* but is more akin to a private contractor. Indeed, the record establishes that it is a private contractor.

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[3] No evidence was presented suggesting the Employer is any of the types of private entities over which the Board either has no jurisdiction or has chosen not to exercise jurisdiction.

A. Lusher was not created by the State of Louisiana.

In the current matter, the Employer was created by the individuals who incorporated it in 2005, not by the State. The Employer was created when its Articles of Incorporation were filed with the Louisiana Secretary of State. Its continued existence as a legal entity depends on its adherence to the corporation laws of the State of Louisiana and the willingness of its private citizen board. Even if the Employer ceased operating the Lusher Charter School, or if the Charter School Law were repealed in its entirety, the Employer would continue existing as a legal entity until its board authorized its dissolution.

The Employer looks to the following language in the Charter Law to establish the Employer was "created directly by" the State:

> It is the intention of the legislature in enacting this Chapter to authorize experimentation by city and parish school boards *by authorizing the creation of* innovative kinds of independent public schools for pupils. Further, it is the intention of the legislature to provide a framework for such experimentation *by the creation of such schools,* a means for all persons with valid ideas and motivation to participate in the experiment.

La. R.S. 17:3972(A) (emphasis added). However, the plain meaning of the language, and its placement in the section of the Charter Law setting forth the law's purpose and intent, is to explain the purpose of allowing such schools to be created, not to actually create them. No where in the Charter School Law is any agency, department, commission, public benefit corporation, or any other entity, actually created.[4] It was not until August 23, 2005, by the filing of the Employer's Articles of Incorporation, that the Employer was created. Therefore, the Employer was not created directly by the State.

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[4] By contrast, note the original language of Section 3 of the National Labor Relations Act: "There is hereby created as an independent agency in the Executive branch of the government, a board, to be known as the "National Labor Relations Board, which shall be composed of."

B. Lusher is not administered by anyone responsible to public officials or the general electorate.

The Employer is not administered by the State. In determining whether an entity is administered by "individuals who are responsible to public officials or the general electorate," the Board looks at whether a majority of those individuals are "appointed by or subject to removal by public officials." *Chicago Mathematics,* 359 NLRB No. 41, slip op. pp. 7-8 (2012). In *Chicago Mathematics,* the Board found that all of the board's directors, who had complete control over the operations of the charter school, could be appointed and removed only by the board itself. Thus, the individuals administering the school were not responsible to public officials or to the general electorate.

Similarly, in the instant case, the Employer is not administered by individuals who are responsible to public officials or the general electorate. In determining whether an entity is administered by individuals responsible to public officials or to the general electorate, the relevant inquiry is whether the individuals who administer the entity are appointed by and subject to removal by public officials. *Charter School Administration Services, Inc.*, 353 NLRB 353 (2008); *Research Foundation of the City University of New York,* 337 NLRB 965, 969 (2002); *Hawkins County*, 402 U.S. at 605. "In following *Hawkins County*, the Board has continued to consider the relationship between the employer's governing body and the Governmental agency to which it is linked. The Board has continued to find it significant if a majority of an employer's board of directors is composed of individuals responsible to public officials or individuals responsible to the general electorate." *Regional Medical Center at Memphis,* 343 NLRB 346, 359 (2004). The "courts and the Board generally consider whether a majority of the employer's governing body – the governing board and executive officers – is appointed by or subject to removal by public officials." *Aramark Corp. v. NLRB*, 156 F.3d 1087,

1093 (10th Cir. 1998), *vacated in part on rehearing en banc*, 176 F.3d 872 (10th Cir. 1999). The Board's approach is very discrete. It looks to whether the composition, selection and removal of the employer's board of directors are determined by law or by the employer's own governing documents. *Research Foundation*, 337 NLRB at 969.

Under the terms of the Employer's Articles of Incorporation, board members are selected by current members (the initial members were named in the Articles of Incorporation). Indeed, the OPSB Chartering Authority prohibits elected officials from serving. Employer Exhibit 1, p. 4 of 38 (I). While there is no explicit provision in the Articles for removing a board member, neither the Charter School Law nor the Employer's charter with the School Board authorizes someone (e.g., a public official or the general electorate) to remove a board member. The record contains no evidence of any other law or authority allowing someone to appoint or remove a board member. Additionally, there is no evidence that a board member has ever been appointed and/or removed by a public official or the general electorate. Thus, it cannot be said that any of the Employer's board members are responsible to public officials or the general electorate.

Further, except for setting standards and guidelines, both the Charter School Law and the Employer's charter grant the Employer's board complete control over the operations of the school, including hiring and firing. Consequently, none of the individuals who have control over the administration of the school may be removed by public officials or the general electorate. Therefore, the Employer is not administered by individuals who are responsible to public officials or the general electorate.

The Board quite routinely asserts jurisdiction over private employers who contract with government entities to provide certain types of services. In *Research Foundation, supra*, the

employer was a private, non-profit corporation that had a contract with the City University of New York (CUNY), a public university. The Board found, *inter alia*, that the employer was not an exempt political subdivision where the employer, as here, was administered by its own board of directors, whose appointment and removal were governed by the employer's own by-laws, not by any law or statutory provisions. In *Connecticut State Conference Board, Amalgamated Transit Union,* 339 NLRB 760 (2003), jurisdiction was asserted over a private employer that had a contract with the State of Connecticut to provide public bus service, where the employer's managers were not responsible to public officials or the general electorate. In *Enrichment Services Program,* 325 NLRB 818 (1998), the Board found that a private employer was not an exempt political subdivision where less than a majority of the members of its board of directors were public officials or individuals responsible to the general electorate.

Similarly here, the Employer was not created directly by the State but by private individuals. The Board finds that entities created by an act of legislation to have been created directly by the State. The Board has even found that entities created by an act of the judiciary to have been created directly by the State. *State Bar of New Mexico,* 346 NLRB 862 (1990) (New Mexico's Supreme Court enactment of rule creating state bar association amounted to direct creation by State). However, entities created by private individuals are not "created directly by" the State, even if they are created with the collaboration of the State to serve a public function on behalf of the State. For example, in *Regional Medical Center at Memphis,* 343 NLRB 346 (2004), the Board found the entity operating the county's public hospital to have been created by private individuals and not created by the county. In that case, after private individuals created a non-profit corporation to operate the hospital, the county dissolved the county hospital authority and executed a contract with the non-profit corporation to operate the hospital. Because the non-

profit corporation was created by individuals, the Board found it was not created directly by the county. *Id.* at 358.

In *Chicago Mathematics,* 359 NLRB No. 41, slip op. p. 6 (2012), the Board found that the operator of a Chicago charter public school was not created directly by the state but, rather, by the individuals who created the non-profit corporation that operated the school. In that case, as here, it was argued that the State of Illinois created the entity through the enactment of the Charter Schools Law, which allowed the existence of charter schools. However, the Board found that the statute simply permitted local school authorities to enter into contracts with private entities to administer public schools and that the entities were created by the individuals who incorporated them. Thus, the Board found the entity administering the charter school was not created directly by the State.

In *Pennsylvania Cyber Charter*, Case 06-RC-120811, 2014 WL 1390806 (4/9/14), the Board rejected the notion that Cyber Charter had been created directly by the state, finding instead that it was created by private individuals who formed a non-profit corporation. The Board found persuasive the facts that no local or state official was involved in the selection or removal of any members of Cyber Charter's governing board, or in the hiring of Cyber Charter's staff, including its CEO. Further, neither Cyber Charter's trustees nor its CEO were directly or personally accountable to any state or local public officials or to the general electorate. The fact that Cyber Charter received public funds to carry out public contracts did not make it an administrative arm of government.

Most recently, in *Evergreen Charter School*, 29-RD-175250 (May 27, 2016), the Regional Director for Region 29 decided that a charter school was a government contractor and an employer over which the Board had jurisdiction. It found that the individual applicants, not

the state board of regents had directly created the school. Moreover, the governance and control were vested solely in private incorporators, not in public entities.

Federal rather than state law governs the determination of whether an entity was a political subdivision. *Hawkins County*, 402 U.S. at 604-06. However, the state's characterization of an entity is an important factor in determining whether an employer was created so as to constitute a department or administrative arm of government. *Hinds County Human Resource Agency,* 331 NLRB 1404 (2000). The Louisiana Attorney General has opined that a Type 2 charter school, an independent public school that is operated pursuant to a charter between a nonprofit corporation and the Board of Elementary and Secondary Education, is not a political subdivision of the state. La. A.G. Op. 04-0317 (2004), 2004 WL 2843115.[5]

The conclusion that Lusher is not a political subdivision is also consistent with a federal court decision applying a different statute. So although it played no role in the Regional Director's findings, she noted the consistency with the decision of the United States District Court for the Eastern District of Louisiana, which recently held that this Employer was free to bring a suit against OPSB under 42 U.S.C. §1983 because it is not a political subdivision of the State or a State actor (*Advocates for Art-Based Education Corp. v. OPSB*, No. 09-6607 (E.D. La. 1/26/10), 2010 WL 357223 (Petitioner Exhibit 4).[6] The court there concluded: "The fact that the charter school performs a governmental function does not make it a political

[5] *See also Louisiana High School Athletics Assoc., Inc. v. State of Louisiana*, 2012-1471*33 (La. 1/29/13) 107 So.3d 583, 607 (LHSAA, a Louisiana nonprofit corporation, was not a public body despite being partially funded by public money earned by state schools under their control at their athletic events and having a connexity with a public body).

[6] Notably, the Employer's CEO, who testified here, conceded her sworn statement supporting the district court's findings in this action: "The (charter) Agreement further provides that Advocates is not an agent of and does not have the authority to bind OPSB." (Emphasis original). Petitioner Exhibit 3, p. 3.

subdivision of the state." And, "under Louisiana law, Advocates is not a political subdivision of the state . . . . "

C. Lusher is not a joint employer with OPSB.

Although the Employer did not raise the issue in the hearing or in its SOP, it now argues that it is exempt from the Board's jurisdiction because it is a joint employer as described in *Browning-Ferris Industries of California Inc., d/b/a BFI Newby Island Reclyclery and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters,* 362 NLRB No. 186 (2015) (BFI) and *NLRB v. Chicago Youth Ctr.*, 616 F.2d 1028 (7th Cir. 1980). In *BFI*, the Board concluded that BFI and Leadpoint were joint employers because BFI had control over who Leadpoint could hire to work at its facility, had both direct and indirect control over the work process and assignments, and had a significant role in determining Leadpoint employee wages. *BFI*, pp. 4-7. The Board explained that two entities are joint employers of a single work force if they share those matters governing the essential terms and conditions of employment such as wages and hours, number of workers, scheduling, seniority, work assignments, and determining the manner and method of work performance. *BFI*, p. 19.

In *Chicago Youth Center*, the critical factor was the public agency's pervasive control over the labor relations of the private agency, which control extended to funding, job classifications, compensation, and the "minutest details of job performance." 616 F.2d at 1029. None of these factors is present in the Lusher-OPSB relationship. The Lusher CEO, Kathleen Riedlinger, testified that the Employer had to submit reports to OPSB (Tr. 58), but nothing more. Notably, the Employer's argument on this lately-raised issue is void of cites to the record. Employer's Request for Review, pp. 17-19. Lusher presented no evidence to support that OPSB

has pervasive control of Lusher's labor relations. Indeed, its operating documents show otherwise, as does the law.

D. The Board should exercise jurisdiction.

The Employer's last argument (not raised in its SOP or at the hearing) is that the Board should exercise its discretion not to assert jurisdiction, citing *Northwestern Univ. and College Athletes Players Ass'n*, 362 NLRB No. 167 (2015) (*CAPA*). In *CAPA*, the Board concluded that it would not effectuate the policies of the Act to assert jurisdiction in that case, even assuming that grant-in-aid scholarship players were employees within the meaning of Section 2(3) because it would not serve to promote stability in labor relations. The Board emphasized the novel and unique circumstances of the case; the fact that it had never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind; and that the scholarship players did not fit into any analytical framework that the Board had used in cases involving other types of students or athletes such as graduate student assistants, student janitors, or cafeteria workers whose employee status the Board had considered in other cases.

Under 29 U.S.C. §164 (c)(1):

> The Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

The Employer relies on *Temple University*, 194 NLRB No. 195 (1972) and *Jefferson Downs, Inc.*, 125 NLRB 386 (1959), in support of its position. But there are no similarities.

The Board declined to assert jurisdiction over Temple University because, although it was a private, nonprofit corporation, it had a unique relationship with the Commonwealth such that the University was denominated in legislation as an "instrumentality" of the Commonwealth

and made a "State-related university in the higher education system of the Commonwealth"; Commonwealth involvement in the financial affairs of the University had become substantial, if not controlling; the Commonwealth had extensive, direct control over University activities; and one-third of the members of its board of trustees were appointed by the Commonwealth.

The Employer strains to construct a comparison by citing state laws that it must comply with and its reporting obligations to OPSB. But its own Charter Agreement states that it "shall be exempt from all rules and regulations of the state board and OPSB with the exception of those specifically agreed to in this Operating Agreement . . . ." Employer Exhibit 2, p. 6, 3.5.1. The agreement further provides that the "Charter School shall control and be responsible for financial management and performance of Charter School including budgeting and expenditures." Employer Exhibit 2, p. 7, 5. Lusher's board does not include any elected officials or persons appointed by any governing authority; indeed they are excluded. Tr. 35; Employer Exhibit 1, p. 4, 3(I) ("No elected official, as defined by the Louisiana Code of Governmental Ethics, and no individual formerly classified as an elected official for a period of one year following the termination of his or her service, may serve on a governing board.")

In *Jefferson Downs, Inc.*, 125 NLRB 386 (1959) and similar cases cited by the Employer, the Board has declined to assert jurisdiction over racetrack operations which are essentially local in nature and subject to extensive state regulation. However, the Board in *Chicago Mathematics*, rejected these comparisons to a charter school. It noted that Chicago Mathematics—like Lusher —had no members of its board politically or publicly appointed. Moreover, the unique circumstances of the dog and horseracing industries, especially their pattern of short-term employment, distinguishes them from the charter school setting.

The Employer makes much of the fact that its teachers participate in the Louisiana Teachers Retirement System, but no evidence was presented to support the contention. Moreover, even if factually supported, it would not be dispositive. Lusher, which was a part of the OPSB system before it became a charter, had a teaching staff that was already participating in that retirement system. La. R.S. 17:3997 (A)(3)(b)(i) provides that the

> provisions of such charter may require only teachers employed by the charter school who previous to employment in the charter school were employees of a local school board to continue active membership in the Teachers' Retirement System of Louisiana for the duration of their employment as charter school teachers, regardless of their leave status.

The Employer's participation in the system is not required by the charter agreement. It would be voluntary.

IV. CONCLUSION

Under clear Board law, the Employer fails to satisfy either prong of *Hawkins County.* It is not exempt from the Board's jurisdiction. Nor is there any rationale for the Board to exercise its discretion to decline to assert jurisdiction. Lusher is an "employer" within the meaning of Section 2(2) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2016, I electronically filed the above and foregoing with the National Labor Relations Board E-filing system, and a copy was served on counsel by E-mail and/or facsimile transmission:

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